IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEQUIM, a noncharter code city and a municipal corporation of the State of Washington, by and through its city council, Respondent, v. PAUL MALKASIAN, circulator, sponsor and presenter of an initiative and a referendum petition to the Sequim City Council, Petitioner.	)	No. 74987-6 En Banc Filed July 13, 2006

MADSEN, J.—This case requires the court to review a procedural tangle. Prior to an election, the city of Sequim acting through its city council, sought a declaratory judgment that a proposed initiative, the Ratepayer's Responsibility Act, was beyond the scope of initiative power of the residents of Sequim, Washington. The trial court disagreed with the city, granted summary judgment in favor of the defendant, Paul Malkasian, and ordered the initiative placed on the

ballot. Although the city appealed, the Court of Appeals declined to stay the trial court's ruling and the election went forward. As a result, eight years later, no appellate court has reviewed the merits of the trial court's ruling.

Contrary to the claim of an overwrought dissent, the issue here is not whether Malkasian is a "hapless private citizen" or the city of Sequim, with a population of under 5,000, is a bully with unlimited resources.[1] The dissent's characterization of this case only further clouds the issues presented in this review. It is time for clarity.

As will be discussed below, the initiative proposed by Malkasian impermissibly contravened authority given to Sequim's city council enabling that elected body to finance important public projects, favored by the residents of Sequim, through the sale of bonds to the public. Rather than address the trial court's ruling that Malkasian's initiative was within the initiative power, the Court of Appeals determined that since the matter now had "evolved" into a postelection challenge to the voter approved initiative, Malkasian was an improper defendant.

We disagree with the Court of Appeals' characterization of this case. The fact that the timing of this review is postelection does not alter the nature of the

[1] According to its web site, in 1913 Sequim became an incorporated town. The city of Sequim has approximately 4,928 residents. The city utilizes the council/manager form of government. The city council of Sequim is comprised of seven elected members and positions are considered part-time. Many council members have full-time careers in addition to their duties on the city council. *See* official gov't web site, city of Sequim, http://www.ci.sequim.wa.us.

claim brought by Sequim—this case was filed as, and continues to be, a challenge to an initiative as exceeding the initiative power, contravening authority given to the city council to finance projects for the residents of Sequim.

As we recently affirmed in *Coppernoll v. Reed*, 155 Wn.2d 290, 299, 119 P.3d 318 (2005), preelection challenges regarding the scope of the initiative power address the fundamental question of whether the subject matter of the measure was "proper for direct legislation." Postelection events do not further sharpen the issues—the subject matter of the proposed measure is either proper for direct legislation or it is not. *Id.* We find that the initiative here is indeed beyond the scope of the initiative power of the residents of Sequim. Accordingly, we reverse that portion of the Court of Appeals' ruling dismissing the appeal, as well as the trial court's summary judgment in favor of Malkasian, and hold that the initiative is invalid as it exceeds the initiative power.

FACTS

The facts in this case are not in dispute. On October 22, 1996, the city, acting through its city council, brought suit pursuant to chapter 7.24 RCW, the Uniform Declaratory Judgments Act, regarding a proposed initiative entitled, "the Ratepayer's Responsibility Act." The proposed initiative would impose additional requirements on revenue bonds issued by the city. The proposed initiative would require the city council of Sequim to obtain ratification by the voters before

issuing citywide revenue bonds authorized under RCW 35.41.030.[2] The proposed initiative provided limited exceptions for bonds and warrants that had been ratified by voters at a prior election or approved by each citizen accepting a future obligation. In addition, under the proposed initiative such revenue bonds would also be subject to all regulations and laws applicable to general obligation bonds regarding notification, publication, and election.

Prior to the proposed initiative being placed on the ballot, the city sought a declaratory judgment that the proposed initiative was beyond the scope of the initiative power of the residents of Sequim and was thus not proper for direct legislation. The city argued that the proposed initiative was beyond the scope of the initiative power because under chapter 35.41 RCW the legislature vested the legislative body of the city (i.e., its city council) with the power to authorize revenue bonds, and not the city itself. The city also sought an injunction prohibiting an election on the proposed initiative and any other further relief the court deemed just. Clerk's Paper (CP) at 296-301. The city served Paul Malkasian as defendant in the action. Malkasian was leading the effort regarding

[2] Under RCW 35.41.030, if the legislative body decides to do so, it can authorize the issuance of revenue bonds by ordinance. The ordinance must be ratified by voters (i.e., subject to a vote) only "in those instances where the original acquisition, construction, or development of such facility or utility is required to be ratified by the voters under the provisions of RCW 35.67.030 and 35.92.070." RCW 35.41.030. Thus, the legislature has already determined which types of revenue bonds require voter ratification and which do not. Contrary to RCW 35.41.030, however, the proposed initiative added a voter ratification requirement for bonds not included within the exceptional circumstances set forth in RCW 35.67.030 and RCW 35.92.070.

the proposed initiative. In a letter requesting that the proposed initiative be placed on the ballot, Malkasian identified himself as the chairperson of an unincorporated group, "Partners in Government." CP at 303. On behalf of this group, Malkasian spearheaded and coordinated the gathering of signatures for the initiative and the circulation of the initiative. He attended meetings of the city council where the initiative was discussed and delivered the initiative and signatures to the city

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[3] Malkasian referred to Partners in Government in numerous ways in this litigation, including identifying it as a committee, a citizens' organization, an unincorporated association, and a group. However, it is undisputed that Partners in Government is unincorporated, and Malkasian has never asserted that Partners in Government had a legal identity separate from Malkasian and thus could or should be a proper party in litigation. The record contains the following:

1. At the bottom of each page of signatures for the petition for the proposed initiative was the following language:
"Return signed petitions by October 23, 1996 to: Paul Malkasian, chair, Partners in Government, 1343 E. Washington St. Sequim, WA 98382." CP at 304.

2. Paul Malkasian delivered the initiative petition to the city clerk of the City of Sequim and the petition was delivered attached to a letter on letterhead of "Partners in Government, Paul Malkasian, Chairperson." CP at 33.

3. In the original complaint for declaratory judgment and injunction filed by the City of Sequim, the city alleged that "Paul Malkasian is the circulator, sponsor and presenter of an initiative petition, designated by the sponsor as, 'The Rate payers Responsibility Act' filed with the City." CP at 296.

4. In his answer to complaint and first amended answer and counterclaim, Malkasian denied that he was the circulator, sponsor and presenter of the initiative but admitted that "Paul Malkasian is a member of Partners in Government, the entity responsible for the initiative petition." CP at 290; 189.

5. In his cross motion for summary judgment, Malkasian said, "Malkasian seeks summary judgment that the petition for referendum and the petition for initiative *presented by him* to the City of Sequim on October 7, 1996 are each within the scope of the initiative power, and an order directing the City to place both petitions on the ballot for the next

clerk.[3]

Both the city council and Malkasian moved for summary judgment on the narrow issue as to whether the initiative was beyond the scope of the relevant initiative power. After a hearing, the trial court granted Malkasian's cross-motion for summary judgment, holding that the initiative was within the initiative power of the residents of the city. The trial court also ordered the city to place the initiative on the ballot. The city sought immediate appellate review and requested a stay, which the Court of Appeals denied.

Both parties briefed the issue in the Court of Appeals prior to election. However, after the election, Malkasian filed a motion to dismiss with the Court of Appeals, claiming that the case was moot. The Court of Appeals denied Malkasian's motion to dismiss but did not address the merits. Instead, the Court of Appeals determined that this was a "postelection" challenge and remanded to the trial court because it claimed that "the record on appeal is insufficient for adequate and appropriate review of the city's challenge" to the new ordinance. Resp't's Suppl. CP at 65.

On remand, the trial court dismissed the case on procedural grounds, finding that Malkasian was not the proper defendant to defend all aspects of the

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regularly scheduled election in the City of Sequim." CP at 182 (emphasis added).

6. In his motion to dismiss after the initiative was passed by the voters, Malkasian states, "Malkasian was a leader in the successful 1996 signature-gathering effort for the initiative." CP at 6; Resp't's Suppl. CP at 70.

ordinance. The trial court also awarded costs to Malkasian but did not grant Malkasian's request for attorney fees finding no statutory authority to do so.

Following the remand, the Court of Appeals again declined to decide the validity of the initiative. Instead, the Court of Appeals held that as a postelection case, the city had standing to bring the action under chapter 7.24 RCW but that Malkasian was an improper defendant to defend all issues surrounding the validity of the ordinance. The Court of Appeals also declined to award Malkasian attorney fees. *See City of Sequim v. Malkasian*, 119 Wn. App. 654, 79 P.3d 24 (2003).

Malkasian petitioned this court for review on the issue of the city's standing postelection and as to his attorney fees. The city cross-petitioned, asking this court to review the validity of the initiative.[4] We granted review on all issues raised by the parties. Washington State Association of Municipal Attorneys filed an amicus curiae brief in support of the city.

DISCUSSION

1. Mootness of Preelection Challenge

The city contends that the narrow issue of whether the initiative was beyond the scope of the initiative power granted to the residents of Sequim, an action it brought before the election was held, is not moot and therefore is properly

[4]As discussed above, the city had earlier appealed the trial court's ruling that the initiative is within the scope of the initiative power. In its cross-petition here, the city again raises its claim that the initiative is beyond the scope of the initiative power and, based on the Court of Appeals' treatment of this case as a postelection case, the city also claims that the ordinance conflicts with the uniformity requirements of state law and impairs contracts.

in front of this court. Malkasian argues that because an intervening election occurred in which the voters approved the initiative, this case is transformed into a postelection challenge and the subject matter challenge is moot. He is incorrect.

An issue is moot if the matter is "purely academic." *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983) (quoting *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968)). However, an issue is not moot if a court can provide any effective relief. *Turner*, 98 Wn.2d at 733 (citing *Pentagram Corp. v. City of Seattle*, 28 Wn. App. 219, 223, 622 P.2d 892 (1981)). *See also* 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3533.3, at 261 (2d ed. 1984) ("The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief."); *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992) (the availability remedy need not be fully satisfactory to avoid mootness).

Malkasian argues that the issues relevant in a preelection review automatically became moot when the election was held, relying on *State ex rel. Jones v. Byers,* 24 Wn.2d 730, 167 P.2d 464 (1946). That case has no application, however, given the facts of this case.

In *Jones*, a petitioner sought a restraining order to stop a vote on a measure

that would dissolve a school district and in its place form a new school district through consolidation. The petitioner maintained that the various county committees required to develop a comprehensive plan prior to the election failed to properly do so. Prior to the election, a hearing was held on the merits and the petitioner did not prevail. An election was then held in which the voters approved the dissolution of the school district and the formation of a new school district. On appeal, the court held that the matter was moot because "[t]he litigation was instituted solely for the purpose of preventing an election" which had already taken place. *Id.* at 733. In such case, "[n]o effectual judgment can be rendered." *Id.* (quoting *Mackay v. Dever*, 49 Wash. 439, 440, 95 P. 860 (1908)).

Unlike in *Jones*, Sequim did not bring an action solely to prevent an election. Rather, the city also sought a declaratory judgment that the initiative was beyond the scope of the initiative power of the residents of Sequim. Where the subject matter of an initiative is beyond the scope of the initiative power, it is "not proper for direct legislation." *Coppernoll*, 155 Wn.2d at 299; *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 745-46, 620 P.2d 82 (1980). It is well-settled that it is proper to bring such narrow challenges prior to an election. *Coppernoll*, 155 Wn.2d at 299 (subject matter challenges prior to an election are proper because they "do not raise concerns regarding justiciability because postelection events will not further sharpen the issue, i.e., the subject of

the proposed measure is either proper for direct legislation or it is not"); *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 717, 911 P.2d 389 (1996) (courts will review a proposed initiative prior to an election to determine if it is beyond the scope of the initiative power) (citing *Seattle Bldg. & Constr.*, 94 Wn.2d at 746; *Leonard v. City of Bothell,* 87 Wn.2d 847, 557 P.2d 1306 (1976); *Ruano v. Spellman*, 81 Wn.2d 820, 505 P.2d 447 (1973); *Ford v. Logan*, 79 Wn.2d 147, 483 P.2d 1247 (1971)). *See also Priorities First v. City of Spokane*, 93 Wn. App. 406, 411, 968 P.2d 431 (1998).

Malkasian has cited no authority, and we have found none, to support his position that voter approval of an initiative changes, modifies, or enlarges the subject matter that is proper for direct legislation through initiative or referendum. Indeed, the law is plainly to the contrary. As we recently concluded in *Coppernoll,* 155 Wn.2d at 299, the subject matter of the initiative is either proper for direct legislation or it is not.

In this case, this court can still provide effective relief. The city requested three types of relief: (1) an injunction preventing the initiative from being placed on the ballot, (2) a declaratory judgment that the initiative was beyond the scope of the initiative power of the residents of Sequim and was thus invalid, and (3) any other relief the court deems just. CP at 300-301. While the election has already taken place and this court can no longer impose an injunction preventing the

election, other effective remedies exist. For example, if this court finds that the subject matter of the initiative was outside the scope of the relevant initiative power, this court can invalidate the initiative. Accordingly, because we can grant an effective remedy, we hold that the preelection challenge, whether the subject matter of the initiative is beyond the scope of the initiative power of the residents of Sequim, is not moot.

2. Whether the Initiative is Beyond the Scope of the Initiative Power

At the heart of this case is the trial court's grant of summary judgment to Malkasian based on its conclusion that the initiative was within the scope of the initiative power. A motion for summary judgment is properly granted where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The standard of review on appeal from an order on summary judgment is de novo. *Sane Transit v. Sound Transit*, 151 Wn.2d 60, 68, 85 P.3d 346 (2004). The appellate court engages in the same inquiry as the trial court. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 630-31, 71 P.3d 644 (2003); *Herron v. Tribune Publ'g Co*., 108 Wn.2d 162, 169, 736 P.2d 249 (1987).

The city contends that the initiative is beyond the scope of the initiative power because it usurps authority granted to the legislative body of the city under chapter 35.41 RCW. In contrast, Malkasian claims that the legislature granted

authority to the city as a corporate entity. Malkasian is incorrect.

An initiative is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself. *See, e.g., Leonard*, 87 Wn.2d at 853 (a grant of power by the legislature to the legislative body of respondent, the city council of the city of Bothell, precludes a referendum election); *State ex rel. Guthrie v. City of Richland*, 80 Wn.2d 382, 384, 494 P.2d 990 (1972) (where the general law grants authority to the governing body of a city, the exercise of that authority may not be subject to repeal, amendment or modification by the people through the initiative or referendum process) (citation omitted); *State ex rel. Bowen v. Kruegel,* 67 Wn.2d 673, 678-79, 409 P.2d 458 (1965) (discussing, inter alia, *State ex rel. Haas v. Pomeroy*, 50 Wn.2d 23, 308 P.2d 684 (1957); *Neils v. City of Seattle*, 185 Wash. 269, 53 P.2d 848 (1936)).

In this case, the legislature unambiguously granted the legislative body of the city the authority over revenue bonds under multiple provisions in chapter 35.41 RCW. RCW 35.41.010 provides in part that the "the *legislative body* of any city or town may authorize, by ordinance, the creation of a special fund or funds" (emphasis added) for purposes of providing funds for defraying all or a portion of the costs of, among other activities, planning, purchase, leasing, or other acquisition of any municipally owned public land, building, facility or utility.

By ordinance, the "*legislative body*" may obligate the city to set aside and pay into a special fund or funds all or a portion of revenues or fees derived from municipally owned utilities or facilities. RCW 35.41.010. Furthermore, "the *legislative body* may also authorize" the creation of a special fund or funds to defray all or a part of the costs of any certain park property involving municipally owned off-street parking space or facilities. *Id*. Under RCW 35.41.030, "[i]f the *legislative body* of a city or town deems it advisable" to, among other actions, purchase, lease, construct, develop, or improve land, building, facility, or utility and the legislative body adopts an ordinance authorizing such action and to provide funds for defraying all or a portion of the costs thereof from the sale of revenue bonds, such city or town may issue revenue bonds against the special fund or funds created solely from revenues. The *legislative body* is required to seek ratification by the voters (voter approval) prior to the issuance of such revenue bonds when only the original acquisition, construction or development is required to be ratified by the voters under the provisions of RCW 35.67.030 and RCW 35.92.070. RCW 35.41.030.[5]

Such revenue bonds may be sold in any manner and for any price "*the legislative body*" of any city or town deems to be for the best interest of the city or town. RCW 35.41.060. Additionally, the "*legislative body*" may provide in any

[5] *See* footnote 1, *infra*.

contract for the construction or acquisition of the proposed facility or utility or maintenance or operation thereof that payment will be made only in revenue bonds or warrants. RCW 35.41.060. The "*legislative body*" may provide by ordinance for fixing of revenue rates and charges for the furnishing of service, use, or benefits. RCW 35.41.080.

The "*legislative body*" is also given authority to waive certain connection charges for low-income persons and to fix charges at rates that will be sufficient to provide for payment of bonds and warrants. RCW 35.41.080(1) and (2). The "*legislative body*" may, in setting the rates to be charged, include all costs and estimated costs in issuing said bonds, including certain construction and engineering costs. RCW 35.41.090. The "*legislative body*" may also pledge certain utility local improvement district assessments to provide additional security for revenue bonds used for water and sewage systems. RCW 35.41.095. Finally, RCW 35.41.100 provides in part that "no restriction, limitation, or regulation relative to the issuance of such bonds contained in any other law shall apply to the bonds issued hereunder."

Given the multiple provisions explicitly providing authority in chapter 35.41 RCW to the "legislative body" of a city or town, we conclude that the legislature granted authority over these types of revenue bonds to the legislative body of the city. This conclusion is consistent with a thoughtful opinion by the

Court of Appeals in *Priorities First,* 93 Wn. App. 406, examining chapter 35.41 RCW while this case was pending on appeal.

In *Priorities First,* an initiative was proposed by certain voters in the city of Spokane requiring in part that an ordinance adopted by the city council authorizing the creation of a fund and pledging of certain revenue under chapter 35.41 RCW be subject to voter ratification prior to implementation. Voter ratification is not required by statute. In that case, the Spokane city council approved a plan to develop an area in downtown Spokane, which included building a parking garage, pledging certain revenues from parking meters, and the issuance of bonds to pay for construction. In finding that the initiative was beyond the scope of the initiative power, the Court of Appeals said that "[w]e agree with the superior court that Initiative 97-1 interferes with authority the Legislature has granted to the City Council in RCW 35.41 to create a special fund to defray costs of a municipally owned facility." *Priorities First,* 93 Wn. App. at 411.

In reaching its conclusion, the Court of Appeals pointed to both RCW 35.41.010 and RCW 35.41.030. *Id.* Under RCW 35.41.030, the "legislative body" of the city of Spokane (the city council) was authorized to create a special fund by ordinance obligating the city of Spokane to set aside and pay a portion of revenues from certain parking meters into the fund. And, pursuant to RCW 35.41.030, if the "legislative body" of the city of Spokane deems it advisable to,

among other actions, acquire, construct, or develop any facility and adopts an ordinance authorizing such action and to provide funds for defraying the cost, the city may issue revenue bonds against the special fund created solely from revenues. The Court of Appeals explained that "requiring voter approval before the City Council pledges or uses city funds sources for off-street parking facilities, the proposed initiative interferes with the power the Legislature granted the city council in these statutes." *Priorities First,* 93 Wn. App. at 412.

The court explained that an initiative cannot interfere with the exercise of power delegated by state law to the governing body of a city. *Id*. at 411 (citing *Guthrie*, 80 Wn.2d at 384) (holding that a referendum requiring voter approval of bonds was outside the scope of the referendum power, grant of power was to the governing body). Stated another way, the court said that "the people cannot deprive the city legislative authority of the power to do what the constitution and/or a state statute specifically permit it to do." *Id.* (citing *King County v. Taxpayers of King County*, 133 Wn.2d 584, 608, 949 P.2d 1260 (1997) (holding that initiative requiring voter approval on bonds was outside the scope of the initiative power)).

It is well-settled that in the context of statutory interpretation, a grant of power to a city's governing body ("legislative authority" or "legislative body") means exclusively the mayor and city council and not the electorate. *See, e.g.,*

Bowen, 67 Wn.2d at 677-78; *Whatcom County v. Brisbane*, 125 Wn.2d 345, 350, 884 P.2d 1326 (1994); *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 344-45, 662 P.2d 845 (1983); *Snohomish County v. Anderson,* 123 Wn.2d 151, 156, 868 P.2d 116 (1994); *Neils*, 185 Wash. at 276-81; *Benton v. Seattle Elec. Co.*, 50 Wash. 156, 159, 96 P. 1033 (1908). When the legislature grants authority to the governing body of a city, that authority is not subject to repeal, amendment, or modification by the people through the initiative or referendum process. *Brisbane*, 125 Wn.2d at 351; *Anderson*, 123 Wn.2d at 156; *Guthrie*, 80 Wn.2d at 384; *Pomeroy*, 50 Wn.2d at 24-25; *Neils*, 185 Wash. at 283; *Bidwell v. City of Bellevue*, 65 Wn. App. 43, 49, 827 P.2d 339 (1992).

In chapter 35.41 RCW, the legislature unambiguously granted the legislative body of the city, the city council (and mayor), power over revenue bonds.[6] The initiative conflicts with that power by requiring that revenue bonds authorized under chapter 35.41 RCW be subject to voter ratification when not required by statute and by requiring that such revenue bonds also be subject to regulations and laws applicable to general obligation bonds regarding notification, publication, and election. These provisions clearly limit and restrict the authority granted by the legislature to the legislative body of the city under chapter 35.41

[6] Because the city has adopted the council-manager form of government, its mayor has limited powers. Its mayor is not separately elected and is one of the elected city council members. Thus, the legislative body of the city is primarily its city council, with limited powers granted to its mayor and city manager. *See, e.g.,* ch. 35A.13 RCW.

RCW. Thus, the subject matter of the initiative is not proper for direct legislation.

Malkasian contends, though, that because RCW 35.41.030 provides in part that "such city or town may issue revenue bonds," the grant of power is to the city as a corporate entity, not to the legislative body. As further support, Malkasian points to RCW 35A.40.080, which he quotes as providing the city, a code city: "[i]n addition to any other authority granted by law, a code city shall have authority . . . ; to issue revenue bonds, coupons and warrants as authorized by chapter 35.41 RCW." Thus, he claims that because the city has the authority to act under chapter 35.41 RCW, the Municipal Revenue Bond Act, the legislature delegated the authority to the city as a corporate entity, bringing matters legislated under that act within the initiative power.

Malkasian's claims are without merit. As discussed above, "the legislative body" is authorized to take multiple complex acts requiring significant understanding of financial markets regarding revenue bonds including creating special funds and pledging of revenues and fees (RCW 35.41.010, .095), authorizing by ordinance the purchase or construction of facilities and providing funds through revenue bonds (RCW 35.41.030), the sale and pricing of revenue bonds and warrants (RCW 35.41.060), and setting the rates and charges for services to pay for revenue bonds or warrants (RCW 35.41.080, .090). The reference in RCW 35.41.030 to a "city or town" being able to "issue" such

revenue bonds does not change or alter the authority granted to the legislative body. Rather, it refers to the legal relationship of the revenue bonds. The city or town is "the issuer" of the revenue bonds because it is the legal entity responsible for payment, not the city council (the legislative body). *See, e.g.,* RCW 35.41.070 (providing in part that the holder of any bond may bring suit against "the city or town" to compel the city or town to set aside and pay into the special fund if such city or town fails to do so).

Moreover, Malkasian fails to fully set forth the provisions in RCW 35A.40.080. Malkasian provided only a few words from that statute mentioning the city's ability to "issue revenue bonds" authorized by chapter 35.41 RCW. RCW 35A.40.080 entitled "Bonds—Form, terms, and maturity" provides in full:

> In addition to any other authority granted by law, a code city shall have authority *to ratify and fund indebtedness* as provided by chapter 35.40 RCW; to issue revenue bonds, coupons and warrants as authorized by chapter 35.41 RCW; *to authorize* and issue local improvement bonds and warrants, installment notes and interest certificates as authorized by chapter 35.45 RCW; to fund indebtedness and to issue other bonds as authorized by chapters 39.44, 39.48, 39.52 RCW, RCW 39.56.020, and 39.56.030 in accordance with the procedures and subject to the limitations therein provided.

RCW 35A.40.080 (emphasis added).

When viewed in its entirety, RCW 35A.40.080 provides the city with the authority to "issue" only revenue bonds under chapter 35.41 RCW. It does not provide the authority "to ratify" or "to authorize" such revenue bonds as it does

with reference to chapter 35.40 RCW or chapter 35.45 RCW, which is consistent with the other provisions cited above in chapter 35.41 RCW. Malkasian also ignores the last part of RCW 35A.40.080, providing that the authority granted to a city or town must be exercised "in accordance with the procedures and subject to the limitations therein." As discussed above, RCW 35.41.100 expressly provides that "no restriction, limitation, or regulation relative to the issuance of such bonds contained in any other law shall apply to the bonds issued hereunder." Accordingly, consistent with *First Priorities*, we hold that the initiative in this case is outside the scope of the initiative power of the residents of Sequim. We hold that the initiative exceeded the initiative power of the residents of Sequim and that the trial court erred in granting summary judgment in favor of Malkasian.[7]

ATTORNEY FEES

Malkasian contends that he should be awarded attorney fees because he was not the proper person to defend all aspects of the ordinance postelection. He relies on the "common fund/common benefit theory" as the basis for an award.

As discussed above, this case was properly brought as a preelection challenge. Contrary to his contention, Malkasian, as chairman of the

[7] Malkasian contends that the Court of Appeals erred in concluding that the city has standing to challenge an ordinance postelection under chapter 7.24 RCW. Because we hold that the initiative exceeded the initiative power and is therefore invalid, we need not decide whether the city had standing to raise postelection challenges to the ordinance passed through the initiative process. Additionally, we need not reach the city's contention that the ordinance conflicts with the uniformity requirement of the state law or impairs contracts.

unincorporated group that initiated the initiative, was named as defendant on the issue only of whether the initiative is proper for direct legislation. The dissent strenuously suggests that the city of Sequim erred in naming Malkasian as a party in the action to defend the proposed initiative prior to the election, claiming that Malkasian was used as a "scapegoat" and "punching bag." However, the dissent, as it must, concedes that it has no authority for its claim and must look to case law and statutory authority only by analogy. The dissent's reliance on inapposite case law and inapplicable statutory provisions is misguided. For example, the dissent points to *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 65 P.3d 1203 (2003) for the proposition that a local government official should have been named as a defendant by the city of Sequim. The dissent fails to explain, however, that *Washington State Labor Council* involved an action to prevent the Secretary of State from certifying the results of an election on a referendum measure. The dissent also fails to point out that in that case, the Secretary of State did not take a position, as it was the historical practice not to, as the city of Sequim did here, that the measure was outside of the initiative power.

In this case, like many other cases, the local officials had a valid concern that the proposed initiative was outside the scope of the initiative power. Numerous cases illustrate that the sponsor of the proposed measure, the person or persons who engaged in the efforts and actions to draft an initiative or referendum,

gather signatures, circulate the measure, and place the measure on the ballot, defends the measure it proposes prior to election. *See, e.g., Brisbane*, 125 Wn.2d 345 (Whatcom County Council sought declaratory judgment that proposed referendum was outside the referendum power; the citizen that conducted that referendum campaign defended the proposed measure); *Snohomish County v. Anderson*, 124 Wn.2d 834, 881 P.2d 240 (1994) (Snohomish County residents attempted to subject a Snohomish County ordinance to referendum; the Snohomish County Council brought suit for declaratory judgment that the referendum was outside the referendum power; citizens who sponsored the referendum defended the proposed referendum); *Maleng v. King County Corr. Guild*, 150 Wn.2d 325, 76 P.3d 727 (2003) (King county official sought declaratory judgment that proposed initiative was outside of the initiative power; sponsor of the initiative, a guild, defended the proposed initiative); *Seattle Bldg. & Constr.,* 94 Wn.2d 740 (a trade group obtained a declaratory judgment against the city of Seattle and proponents of the initiative that proposed initiative was outside of the initiative power).

Similarly, in cases in which the local official declined to place a measure on the ballot based on a good faith belief that the measure was outside of the initiative/referendum power, the sponsor or sponsors of the measure defended the proposed measure. *See, e.g., Priorities First,* 93 Wn. App. 406 (sponsor, a

political action committee, brought suit against a city and its city council after the city council determined an initiative regarding bonds was outside the scope of the initiative power, sponsor defended the proposed initiative); *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 662 P.2d 845 (1983) (sponsors of a proposed referendum brought suit to place the proposed measure on the ballot; sponsors defended the proposed referendum). In all of the cases mentioned above regarding local initiative/referendum measures, the sponsors who campaigned for the measures defended the proposed measures. This alignment of parties is consistent with justiciability and standing requirements that parties in a legal action be adversarial and have sufficient opposing interests in the matter. *See, e.g.,* 13 Wright, Miller & Cooper, *supra,* § 3530, at 308 (in each case there must be a conflict of interest between at least two genuinely adversary parties; the self-interests of the adversaries are relied upon to provide the foundation for sound adjudication). Sponsors of proposed initiatives are clearly interested in the matter.

The dissent also misplaces reliance on RCW 7.25.020, claiming that "by analogy" the provision supports its view that Malkasian was erroneously named as a party to the litigation because that statutory provision requires the appointment of counsel in other declaratory actions. As set forth in the statute, chapter 7.25 RCW applies in cases involving an actual issuance of bonds by a municipal entity.

RCW 7.25.010 (statute applies when legislative body of city or other municipal entity has "passed an ordinance or resolution authorizing" the issuance of bonds and the validity of such proposed bond issue may be tested in chapter 7.25 RCW); RCW 7.25.020 (the complaint shall set forth the ordinance or resolution authorizing the issuance and sale of bonds and the title to the action shall be "'[i]n re (name of bond issue).'"). This case does not involve a local ordinance or resolution authorizing the issuance of bonds as required by RCW 7.25.010 and thus has no applicability. Thus, though full of fire and brimstone and heated barbs, the dissent's views are not supported by either law or logic.

Even if the dissent were correct that Malkasian is the wrong defendant, no contract or statute authorizes attorney fees for Malkasian. "Attorney fees may be awarded only if authorized by 'contract, statute or recognized ground in equity'." *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993) (quoting *Painting & Decorating Contractors of Am., Inc. v. Ellensburg Sch. Dist.*, 96 Wn.2d 806, 815, 638 P.2d 1220 (1982); *Seattle Sch. Dist. No. 1 v. State,* 90 Wn.2d 476, 540, 585 P.2d 71 (1978)). Furthermore, the "common fund/common benefit" theory, a narrow equitable ground for awarding attorney fees, does not apply. Under this equitable theory, a court is authorized to award attorney fees only when a litigant preserves or creates a common fund for the benefit of others as well as themselves. *Bowles*, 121 Wn.2d at 70-71 (the common fund and common

fund/substantial benefit doctrine authorizes attorney fees only when the litigants *also* preserve or create a common fund for the benefit of others as well as themselves in addition to providing a substantial benefit upon others); *Leischner v. Alldridge,* 114 Wn.2d 753, 756-58, 790 P.2d 1234 (1990); *Seattle Sch. Dist.,* 90 Wn.2d at 542-45; *Painting & Decorating Contractors*, 96 Wn.2d at 815. Malkasian did not create or preserve a common fund.

The dissent erroneously suggests that common fund/substantial benefit doctrine no longer requires creation or preservation of a common fund. The dissent's view is directly contrary to Washington law. *See, e.g., Painting & Decorating Contractors,* 96 Wn.2d at 815 (denying request for attorney fees when benefit was conferred upon others but no common fund or asset was preserved or created); *Bowles*, 121 Wn.2d at 70-71. Nor does this case involve minority shareholder rights. *Seattle Trust & Sav. Bank v. McCarthy,* 94 Wn.2d 605, 617 P.2d 1023 (1980) (awarding attorney fees to minority shareholder). As courts have repeatedly clarified, the common fund/substantial benefit doctrine is applicable only when the litigant preserves assets or creates a common fund, in addition to conferring a substantial benefit upon others. *See, e.g., Interlake Porsche + Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 728 P.2d 597 (1986) (finding an award of attorney fees to appropriate to minority shareholder when shareholder *both* created a common fund *and* conferred a substantial benefit upon corporate

shareholders); *Bowles*, 121 Wn.2d at 70-71 (common fund/substantial benefit doctrine requires litigant to both create a common fund or preserve assets and to confer a substantial benefit upon others); *Painting & Decorating Contractors*, 96 Wn.2d at 815 ("[t]he equitable doctrine of 'common benefit/common fund' upon which PDCA [Painting & Decorating Contractors of Am.] relies does not in fact exist here, for there is nothing in the record to establish that PDCA's action protected, preserved or created a [common] fund from which attorneys' fees could be awarded").

Although attorney fees are not appropriate, Malkasian may be entitled to costs. RCW 7.24.100 provides that "[i]n any proceeding under this chapter, the court may make such award of costs as may seem equitable." Costs do not include attorney fees. *Seattle Sch. Dist.,* 90 Wn.2d at 540-41. We find that a remand is warranted to determine if an award of costs to Malkasian is appropriate under the circumstances.

CONCLUSION

The city council of Sequim initiated this declaratory judgment action challenging an initiative, the Ratepayer's Responsibility Act, as exceeding the initiative power. Contrary to the dissent's protestations that the city treated Malkasian as a "punching bag," Malkasian spearheaded the campaign to place a proposed initiative on the ballot that was plainly outside of the initiative power.

As a result, far from being the villains portrayed by the dissent, the city council brought this action in line with its duty to both uphold and enforce the law and to represent the people of their community.

Municipal bonds are used to finance an array of projects including elementary schools, streets and roads, bridges and highways, water tunnels and sewage treatment plants; state and local governments borrow for public purposes that better the lives of the people who live in the community or of those who use the services of municipal enterprises. *See, e.g.,* Judy Wesalo Temel, *The Fundamentals of Municipal Bonds*, 1, 51 (5th ed. 2001); Michael V. Brandes, *Naked Guide to Bonds: What You Need to Know-Stripped Down to the Bare Essentials*, 8 (2004). The issuance and sale of municipal bonds (bonds issued by governmental entities) is exceedingly complex, involving among many actions, assessments of population and business growth and national financial markets and consultation with financial advisers and underwriters. *See, e.g.*, Temel, *supra*, at 49-81. Using its discretion to do so, the legislature decided to place the power over this important and complex task to authorize revenue bonds in the city's legislative body.

We hold that the initiative was indeed outside of the initiative power, contravening the authority over bonds given to the city council as the legislative body of the city of Sequim under chapter 35.41 RCW. Additionally, we hold that the question of

whether an initiative is beyond the scope of the initiative power is not mooted by an election since an election does not alter or expand the scope of the initiative power. This case is remanded for further proceedings consistent with this opinion.

AUTHOR:
Justice Barbara A. Madsen

WE CONCUR:

Justice Charles W. Johnson

Justice Susan Owens

Justice Mary E. Fairhurst

Justice Bobbe J. Bridge